

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DOMINICK AGAPOV,

Plaintiff,

-against-

UBIF FRANCHISING CO.,

Defendant.

ORDER

23-CV-02178 (PMH)

PHILIP M. HALPERN, United States District Judge:

Defendant removed this case to this Court on March 14, 2023 after having filed a motion to dismiss in Westchester County Supreme Court. (Doc. 1). Defendant states that this case did not become removable until Plaintiff evidenced an intent to state federal claims for relief in opposition to the motion to dismiss. (*Id.*). Defendant, on March 21, 2023, filed a reply brief in this Court in support of the motion to dismiss filed prior to removal. (Doc. 9).

Federal Rule of Civil Procedure 81 states that “[a]fter removal, repleading is unnecessary *unless the court orders it.*” Fed. R. Civ. P. 81 (emphasis added); *see also Kansallis-Osake-Pankki v. Kouri*, 150 F.R.D. 69, 72 (S.D.N.Y. 1993) (“Rule 81(c) by its terms applies to answers *or motions to dismiss* in response to removed pleadings.” (emphasis added)).

There are a number of reasons why filing a substitute motion to dismiss, as opposed to relying on that filed in State Court, is necessary here. First, this case involves a *pro se* Plaintiff who ought to be afforded an opportunity to oppose the motion in front of this Court. Second, different pleading standards and the application of federal law to the case necessitate a new motion, especially in light of Defendant’s argument that service of process was not properly effected prior to removal. *See, e.g.* 28 U.S.C. § 1448 (allowing “new process [to be] issued in the same manner as in cases originally filed in such district court” in removed cases). Third, Defendant must comply


with the Court's Individual Practices, which permit, *inter alia*, Plaintiff an opportunity to seek leave to amend the Complaint in response to a pre-motion letter.

For all of these reasons, Defendant is denied leave to rely on the motion to dismiss filed prior to removal without prejudice to renewal in this Court in accordance with the Court's Individual Practices. Defendant's time to answer or otherwise respond to the Complaint is *sua sponte* extended to April 24, 2023.

The Clerk of Court is respectfully directed to terminate the motion sequence pending at Doc. 9.

SO ORDERED:

Dated: White Plains, New York
March 22, 2023



PHILIP M. HALPERN
United States District Judge